

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>HELADIO RIVAS</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 250,364
<b>IBP, INC.</b>	)	
Respondent	)	
Self-Insured	)	
	)	

**ORDER**

Claimant appeals from the July 26, 2002 Decision entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Appeals Board (Board) heard oral argument on February 11, 2003. The Director of the Division of Workers Compensation appointed Jeffrey K. Cooper of Topeka, Kansas, to serve as Board Member Pro Tem in place of Board Member Gary M. Korte who recused himself from this proceeding.

**APPEARANCES**

C. Albert Herdoiza and Thomas R. Fields of Kansas City, Kansas, appeared for claimant. Wendell W. Wurst of Garden City, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The Board considered the record listed in the Decision. Also, the stipulations listed in the Decision are adopted, but with the following modifications:

1. Claimant alleges a series of accidents beginning September 24, 1999 and continuing each and every day worked thereafter.
2. Respondent is self-insured. Accordingly, there is no insurance carrier.

In addition, although no temporary total disability compensation has been paid, the parties stipulated that claimant was taken off work by his treating physician from October 15, 1999, through November 13, 1999, and December 15, 1999, until January 17, 2000.<sup>1</sup>

### ISSUES

Judge Fuller's Decision listed the following issues:

1. Whether Claimant met with personal injury by accident arising out of and in the course of his employment on September 24, 1999.
2. Notice.
3. Nature and extent of disability.
4. Payment of medical bills.
5. Reimbursement of \$1,900.00 medical expenses.
6. Medical mileage in the sum of \$2,747.00.
7. Unauthorized medical.
8. Future medical. <sup>2</sup>

Following a thorough discussion of the evidence, Judge Fuller concluded claimant had failed to prove that his condition was work-related.

Based on all the evidence presented, this court can not find by a preponderance of the credible evidence that it is more probably true than not that the Claimant's injury was caused by or aggravated by his employment with the Respondent. The Claimant did not meet with personal injury by accident arising out of and in the course of his employment.

---

<sup>1</sup> R.H. Trans. at 7-8. See also, Claimant's Brief to the Workers Compensation Appeals Board, Stipulation No. 5 (filed 10-2-02).

<sup>2</sup> Decision dated July 26, 2002.

2. Based on the court's ruling as it pertains to Issue No. 1, the court need not address Issues No. 2, 3, 4, 5, 6, 7 and 8.<sup>3</sup>

In his Application for Review by the Workers' Compensation Board and Docketing Statement, claimant requested ". . . the Workers' Compensation Board to reverse the decision of the Administrative Law Judge and remand it for consideration of the remaining undecided issues." But in his brief and during oral argument to the Board, claimant requested that the Board decide all issues. Respondent did not agree, however, and asked that if the Board reverses the ALJ on the issue of whether claimant suffered personal injury by accident or accidents arising out of and in the course of his employment, the remaining issues which were not reached by the ALJ be remanded. Accordingly, the Board limited the parties' oral arguments to the single issue decided by the ALJ.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, and having considered the parties' briefs and oral arguments, the Board finds that the ALJ's decision should be reversed and remanded.

Claimant started working for respondent in August 1993. He began the washing tripe job on March 21, 1996. Claimant continued performing that job until sometime in June 1999 when claimant began receiving medical treatment for a ganglion cyst on his left wrist. Claimant was placed on light duty until sometime in September 1999 when he was returned to his regular washing tripe job.

Claimant's primary job was to pull tripe from a machine. This required claimant to bend, reach up and complete a variety of pulling and twisting motions with his arms and torso. It also placed stress on his upper and lower back. In addition, at least seven times per shift claimant was required to haul 2 buckets of chemicals up a flight of stairs to his workstation and lift them on an elevated catwalk.

Claimant began experiencing numbness and weakness in his upper and lower extremities in August and September 1999. Claimant was initially seen by Dr. C. Le who sent claimant to St. Catherine's Hospital for testing and then referred him to a neurologist, Dr. Malaz Almsaddi.

Dr. Almsaddi determined claimant should be seen by a neurosurgeon. Claimant was initially examined by Dr. John Hered in Wichita on October 25, 1999. His care was

---

<sup>3</sup> Decision dated July 26, 2002 at 6.

then transferred to another neurosurgeon, Dr. William Shapiro, who ultimately performed an anterior cervical discectomy with bony inter-body fusion surgery at L5-L6 on December 15, 1999.

Claimant was again returned to work on a restricted basis on January 17, 2000.

The dispute in the case centers around claimant's specific job duties and whether the physical requirements of those tasks caused or contributed to claimant's cervical disc herniation. Dr. Almsaddi and Dr. Edward Prostic believe that they did, whereas Dr. Sergio Delgado contends they did not.

The ALJ apparently relied upon Dr. Delgado to find that the claimant's work activities neither caused nor aggravated his condition. But Dr. Delgado acknowledged that it does not take very much force to herniate a disc. He also admitted that excessive movement of the neck could cause a herniated disc in an individual with a preexisting degenerative condition. Nevertheless, Dr. Delgado concluded that claimant's condition was a natural progression of his preexisting degenerative disc disease which would have continued regardless of his employment activities. Dr. Delgado did not specifically address whether claimant's job accelerated or hastened the progress of his condition.<sup>4</sup> Furthermore, Dr. Delgado primarily relied upon a videotape and a written job description for his information about claimant's job duties. What the videotape and written job description failed to show was that claimant carried two buckets of chemicals weighing 18 to 20 pounds each from the storage area to a cat-walk approximately seven times each shift.<sup>5</sup> The ALJ incorrectly noted that Mr. Jones testified the buckets weighed three to five pounds. Actually, Mr. Jones described the buckets as three to five gallons without giving a weight. Claimant also testified that he occasionally replaced containers of chemicals that weighed approximately 80 pounds by rolling them onto a dolly and then lifting the containers onto a platform in the chemical storage area. This duty was also not included in the videotape or the written job description.

Dr. Almsaddi was not provided with either the videotape or the written job description before he testified. Nevertheless, his opinion clearly correlates with claimant's job activities. Dr. Almsaddi concluded that claimant's job activities aggravated his preexisting degenerative cervical disc condition. "I believe the repetitive movement, pushing, pulling, lifting, and carrying, you know, anything beyond 15 to 20 pounds would certainly exaggerate the condition and can lead to what he's suffered from."<sup>6</sup>

---

<sup>4</sup> See *Hanson v. Logan USD 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2001).

<sup>5</sup> Jones Depo at 16.

<sup>6</sup> Almsaddi Depo at 7.

Furthermore, even the seven to eight pound weight of the intestines, over time, would aggravate claimant's condition: "Repetitive movement can - - with a lot of pressure on the disc in the neck, and over years that can build up, yes." <sup>7</sup>

Likewise, Dr. Prostic concluded that the repetitive lifting and pulling that claimant performed aggravated his herniated disc. He specifically related repetitious forceful use of the upper extremities as causative factors. Dr. Prostic was also not provided with the videotape and written job description. He obtained his information concerning claimant's job duties from the claimant himself, including a review of claimant's preliminary hearing and regular hearing testimony. Claimant's testimony is not disputed in any significant detail except for the number of times claimant was required to support a broken diverter. Claimant related this as essentially a weekly occurrence whereas claimant's supervisor, Mr. Jones, disputed that testimony. Mr. Jones disputed the frequency of the machine being broken and contended that on those occasions another employee would be added to assist claimant. The resolution of this dispute is not critical to the opinions of either Dr. Almsaddi or Dr. Prostic. Whereas, Dr. Delgado relied upon what was depicted in the videotape and written job description. The videotape only showed the worker carrying a single bucket. The written job summary likewise described carrying a single bucket weighing no more than 20 pounds. Neither showed or mentioned ever carrying two buckets simultaneously (up to 40 pounds total) or moving an 80 pound container. Therefore, Dr. Delgado believed that claimant's job was lighter than what claimant described.

To receive workers compensation benefits, the claimant must show a "personal injury by accident arising out of and in the course of employment." <sup>8</sup> The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact. <sup>9</sup> Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to each case. <sup>10</sup>

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition. <sup>11</sup> The test is not

---

<sup>7</sup> Almsaddi Depo at 8.

<sup>8</sup> K.S.A. 44-501(a); *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 197, 689 P.2d 837 (1984).

<sup>9</sup> *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, 805, 909 P.2d 657 (1995).

<sup>10</sup> *Newman v. Bennett*, 212 Kan. 562, 568, 512 P.2d 497 (1973).

<sup>11</sup> *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

whether the accident causes the condition, but whether the accident aggravates, accelerates or intensifies the condition.<sup>12</sup>

The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.<sup>13</sup>

The Board finds that, in this instance, the opinions of Dr. Almsaddi, the only one of the treating physicians to testify, and of Dr. Prostic, claimant's medical expert, are the more credible opinions concerning a work-related aggravation or acceleration of claimant's cervical disc condition. So claimant has proven he suffered injury by a series of accidents arising out of and in the course of his employment with respondent.

**Award**

**WHEREFORE**, the July 26, 2002 Decision entered by Administrative Law Judge Pamela J. Fuller, is reversed and remanded for a determination of the remaining issues consistent with this Order.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March 2003.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
<sup>12</sup> *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997); *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

<sup>13</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

c: C. Albert Herdoiza and Thomas R. Fields, Attorneys for Claimant  
Wendell W. Wurst, Attorney for Respondent  
Pamela J. Fuller, Administrative Law Judge  
Director, Workers Compensation Director